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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

E.M. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Real Party in Interest.

G041223

(Super. Ct. Nos. DP0010751 &
DP013548)

O P I N I O N

Original proceeding; petitions for a writ of mandate to challenge an order of the Superior Court of Orange County, John C. Gastelum, Judge. Petitions denied.

Law Office of Susan A. Barry and Lawrence A. Aufill for Petitioners E.M and C.M.

Donna P. Chirco for Petitioner W.L.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen, Deputy Counsel, and Aurelio Torre, Deputy County Counsel, for Real Party in Interest.

* * *

Petitioners W.L., a prospective adoptive mother, and now four-and-a-half-year-old E.M. and almost three-year-old C.M. (the children), challenge an order removing the children from W.L.'s home under Welfare and Institutions Code section 366.26, subdivision (n) (all further statutory references are to this code). They contend it was not in the children's best interests to be removed from W.L.'s care or separated from their sibling whom W.L. had previously adopted. We agree with the juvenile court judge that this is a difficult decision but we deny the petitions.

FACTS

E.M. and subsequently his brother, C.M., were placed with W.L. within a couple of days of their birth based, in part, on their mother's drug use. R.L., their biological brother, had previously been placed with W.L. and she has since adopted him. Both children had severe developmental and physical problems requiring substantial physical and occupational therapy. W.L. wanted to adopt both children. She was subsequently given de facto parent status and deemed to be their prospective adoptive mother. W.L. had foster care and daycare licenses and in addition to R.L. had adopted two other children.

When the children were about two and three and a half years old, Orange County Social Services Agency (SSA) sought to remove them based on substantiated allegations W.L. had severely neglected S.K., an infant who had been placed with her, and an investigation of W.L.'s daycare license. S.K. was hospitalized for failure to thrive

after losing two pounds while in W.L.'s care. Three doctors treating or examining S.K. believed the weight loss was due to insufficient intake of calories, although her diagnosed reflux could have been a factor. One doctor noted that S.K. had been in three different foster homes but lost weight only with W.L. Once admitted to the hospital S.K. had gained weight.

Additionally W.L. waited 17 days to follow up with a physician instead of the scheduled 7 days and did not follow medication instructions. W.L. said she complied with feeding instructions and that there had been a mix-up with the appointment date. She also explained she could not fill a prescription timely due to lack of insurance payment and she already had some of the medication to use during the interim. She said that although she did not report S.K.'s weight loss to the licensing agency as required, she did tell caseworkers.

The agency conducting the adoption home study halted it because of the report of S.K.'s abuse and W.L.'s failure to complete necessary requirements, including medical exams and TB testing for household members, submission of tax returns, and an interview.

W.L. asked for a bonding study, in which the children joined. The court denied the request when SSA did not object to a finding the children were bonded to W.L. and saw her as their primary caretaker. The court noted there was nothing else an expert could report. It found removal of the children would cause them serious emotional harm because the children had lived with W.L. their entire lives.

At the hearing social worker Ronald Toole testified he did not believe it was in the children's best interest to remove them but rather that it could be harmful. He said the children had seemed to interact with R.L. and that W.L. had been proactive in seeking treatment for their developmental problems. After Toole testified SSA filed a report wherein Toole stated his opinion it would be in the children's best interests to remove them from W.L.'s care.

Sheri Bocci, a foster care licensing analyst with SSA, had investigated the alleged abuse of S.K. and had substantiated it based on W.L.'s failure to feed her properly, delay in scheduling a follow-up medical appointment and in obtaining prescription medication, and failure to report S.K.'s hospitalization to licensing officials. She testified S.K. lost close to two pounds while in W.L.'s care. Although W.L. had tried to obtain S.K.'s prescription and had finally been able to, she failed to report the delay as required. Further, she was more than a week late in scheduling a doctor's appointment for S.K.'s weight loss. Bocci was recommending that W.L.'s care license be revoked but she had felt no personal animus against W.L.

Social worker Shiobhan Martin also investigated the allegation of W.L.'s neglect of S.K. and substantiated it after speaking to doctors, nurses, several social workers, and W.L. and her son, and reviewing medical records. S.K.'s pediatrician said he had instructed W.L. to feed S.K. every three hours and return for a follow-up visit in a week. W.L. did not return for two and a half weeks. Another doctor from CHOC agreed W.L. had not fed S.K. enough food. W.L. told Martin she fed S.K. every four to five hours. Chad, W.L.'s adult son, said there was no set time at night to feed S.K. When S.K. was returned to W.L. after her hospitalization, S.K. did gain some weight; one doctor believed it might have been due to some new medication.

The medical director of the Child Abuse Service Team testified that, based on her review of medical records, S.K. had not received sufficient calories.

The social worker conducting the home study for W.L.'s adoption of the children testified certain requirements had yet to be fulfilled. Based on the substantiated neglect of S.K. and W.L.'s "lack of motivation to complete th[e] home study," she would recommend denying the home study. The supervisor of the SSA adoption program testified the home study would be denied for the same reasons. Without an SSA approved home study, the children would not be eligible for adoption assistance funds.

The children's pediatrician, Dr. Frankel, testified W.L. had brought both in for shots on target and brought E.M. for follow-up appointments on time. He said E.M. had developmental delays and believed he had feeding issues when younger. On a couple of occasions he seemed to confuse the two children.

In addition to other witnesses W.L. called, she also took the stand. She testified E.M. looked to her as his mother. She said she had given the case worker from the adoption agency everything that had been requested but she was not in a hurry to complete E.M.'s adoption because she wanted to adopt both boys together. She stated SSA had never told her she was behind in completing the home study and that as far as she knew everything was on schedule. She testified she did not need the adoption assistance funds to be able to support the children because they qualified for other aid programs.

As to S.K., she stated she had not been given any feeding instructions until the baby was returned to her care after being hospitalized. She also testified she had been told to return for a follow-up appointment in two weeks, not the one week the doctor was claiming. She explained she had almost always fed S.K. every three hours.

She testified an SSA compliance officer had "created" some of the violations, such as throwing food on her floor and then citing her for a dirty floor. She also said the officer created or made up other offenses that were the basis of citations. SSA put into evidence licensing reports for the past five years that showed many violations. W.L. believed Bocci's negative opinion of her was the reason for the hearing.

W.L. admitted she had taken E.M. out of occupational and physical therapy for a period and then taken some time to reenroll him. Documents introduced by SSA showed he had been terminated from the program because he did not comply with attendance requirements. W.L. put C.M.'s therapy on hold because of the hearing and acknowledged it was not in his best interest. SSA documents stated his attendance was "fair," with absences attributed to illness and lack of transportation.

After the hearing in a lengthy explanation of its decision made from the bench, the court found that, based on the preponderance of the evidence, it was in the children's best interests to remove them from W.L.'s home. It considered the evidence weighing in favor of removal as well as the detriment the children will suffer in taking them from the only home they had had.

It grounded its ruling on several factors. It found "there [was] a pattern of neglect" of the children and S.K., noting the latter's weight loss while in W.L.'s care, although it did acknowledge there was some weight gain as well. It also relied on W.L.'s failure to obtain S.K.'s medications timely. The court pointed to the testimony of the three doctors who examined or treated S.K. and determined her weight loss was due to insufficient calorie intake, not the fact she was taking Phenobarbital. And W.L. failed to recognize and attend to that problem, despite the fact she had cared for other children with weight loss problems. Further, medical records revealed W.L. failed to make timely follow-up medical appointments for S.K. The court also relied on the "substantiated [child abuse report] of severe neglect" of S.K.

The evidence showed W.L. missed a significant number of necessary appointments for the children's occupational and physical therapy. The court cited specifically to W.L.'s decision to stop the therapy due to upcoming hearings, noting she was not acting in the children's best interest but it was consistent with her handling things at her own convenience and showed poor judgment. Even though the therapy reports showed the children had made progress, the court considered how much more there could have been had all appointments been kept.

Another factor on which the court relied was W.L.'s failure to timely complete the home study for adoption of the children, resulting in SSA's inability to consent to the adoption. As a result, the children would be ineligible to receive funds from the adoption assistance program. Despite W.L.'s claim she did not need the funds to be able to adopt, the children, not the parent, have the right to the money. The court

emphasized that the money was not the only factor on which it based its decision, however. The court found credible the social worker's testimony that she did not tell mother to hold off on completion but rather told her to move forward with it.

As to the hundreds of pages of exhibits showing W.L.'s past licensing and daycare violations, the court found it showed "a consistent pattern of [W.L.'s] failure to do what's in the best interest of these children . . . to ensure their safety and . . . needed care"

The court did not find the children's pediatrician, Dr. Frankel, credible because he was unprepared and his opinions were generalized conclusions without specific facts to back them up.

Another factor considered was the bond with their biological sibling, R.L., already adopted by W.L. The court found the evidence did not show a particularly strong bond, given the children's young age and their even lower functioning due to their severe developmental delays.

The court was disturbed that W.L. did not take responsibility for the problems and try to remedy them but blamed others. The court observed the demeanor and credibility of W.L. and SSA witnesses and found the latter to be credible but not W.L. Her explanations were more like "contrived excuse[s]" so she would not have to take responsibility for her "neglect of these children" and for failure to complete her adoption study. There was no factual basis for W.L.'s description of the events as an SSA witch hunt. Instead mother "appear[ed] to be in denial regarding her neglect and its impact upon these children."

DISCUSSION

Petitioners assert the court abused its discretion in removing the children from W.L.'s home because it was not in their best interests under section 366.26,

subdivision (n)(3)(B), which requires such a finding before removal. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) “At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child. [Citations.]” (*Ibid.*)

“The concept of best interest ‘is an elusive guideline that belies rigid definition. Its purpose is to maximize a child’s opportunity to develop into a stable, well-adjusted adult.’ [Citations.] A primary consideration in determining the child’s best interest is the goal of assuring stability and continuity of care. [Citation.] This can occur only by considering all the evidence available to the court at the time the court makes its decision regarding removal of the child.” (*State Dept. of Social Services v. Superior Court* (2008) 162 Cal.App.4th 273, 286-287.)

Here the court cited several factors as set out above in determining it was in the best interests of the children to remove them from W.L. Petitioners point to contrary evidence favoring a decision not to remove the children as to each of these issues. For example, they note that Toole testified that he did not believe removal was in the best interest of the children, but subsequent to his testimony in a supplemental report Toole changed his opinion and stated it would be in their best interests to be removed.

Further, that adoption does not require SSA approval does not vitiate the detriment to the children resulting from loss of aid funds to which they were entitled. The court specifically stated that money was not the sole ground on which it relied. It was within the court’s discretion to use this as a factor in its decision.

Additionally, that the children were bonded with W.L. was a substantial factor the court considered and weighed. We acknowledge the evidence of the bond is undisputed and it is significant. And it will be difficult for the children to be separated from the only mother they have ever known. But the court had discretion to rely on the countervailing evidence in making the difficult decision to remove the children.

In a related argument petitioners point to a bond between the children and W.L.'s other children, relying on statements in SSA reports that E.M. "seems to enjoy interacting with all the family members . . ." and the children appeared to have bonded with Chad, and testimony that R.L. is close to E.M. They argue the best interests of the children is to be placed with R.L. and challenge for lack of evidence the court's finding that due to the children's young age and even lower level functioning there was not a strong bond. The court's finding is a reasonable inference in light of the evidence.

We also reject petitioners' argument that S.K.'s weight loss was not her fault but had other causes. First, there was sufficient evidence the cause was most likely that S.K. had not been fed a sufficient amount of food. Further, evidence that the amount of weight loss was less than two pounds is merely that, contrary evidence. Moreover, even if there were other causes, the court found W.L. should have noticed and dealt with the problem, especially given her experience with weight loss children. That W.L. may not have intentionally failed to feed S.K. is not the issue.

We are not persuaded by the claim that the problem with S.K. should not be considered or given much weight because there is no evidence she neglected the children. The fact that she neglected one child is substantial evidence of possible danger to the children. Likewise, that reports noted the children had done well in her care and that she took care of their needs is merely evidence contrary to that militating in favor of removal.

But we do not reweigh evidence or reconsider credibility. "[W]hen a court has made a custody determination in a dependency proceeding, "a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."" [Citations.] . . . 'When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.) Here we find no arbitrary decision but a careful consideration of all the evidence.

It is true that “[w]hen custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role[,]” which “‘often dictate[s] the conclusion that maintenance of the current arrangement would be in the best interests of that child.’ [Citations.]” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The court weighed this need against the negative factors and reached the conclusion the latter required removal because W.L. was “not meeting the needs of the[] children.” This is a reasonable exercise of discretion that we will not disturb.

DISPOSITION

The petitions are denied.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O’LEARY, J.

IKOLA, J.